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MOTION FILED

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No. 00-549

In The

# Supreme Court of the United States

CEDRIC KUSHNER PROMOTIONS, LTD.,

*Petitioner,*

vs.

DON KING, DON KING PRODUCTIONS, INC., DKP CORPORATION and JOHN DOES 1-10,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether under 18 U.S.C. § 1962(c) a corporate president may be designated as the RICO "person" who engages in predicate acts by and through a corporation designated as the RICO "enterprise"?

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

### Statement of Facts

The National Association of Securities and Commercial Law Attorneys (NASCAT), by counsel and pursuant to Rule 37.3(b), hereby files its Motion for Leave to File *Amicus Curiae* Brief in this case. In support of its Motion, NASCAT makes the following showing:

Pursuant to Rule 37.3(a), by letters dated January 8, 2001, NASCAT's Counsel of Record sought written consent from Counsel of Record for Petitioner and Respondents. Petitioner's counsel granted written consent; however, Respondents' counsel has failed or refused to do so.[1]

### Nature of NASCAT's Interest

NASCAT is composed of attorneys who primarily represent plaintiffs in civil actions seeking to recover damages for violations of antitrust, civil rights, commercial, consumer protection, employee and retiree benefits, environmental, insurance and securities laws, as well as violations of federal and state constitutions. NASCAT's members represent victims of corporate and government abuse, schemes to defraud, defective products, and anti-competitive conduct. Civil actions brought by NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers and deprive them of the

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[1] A copy of the consent letter received from Petitioner's Counsel of Record is submitted with this Motion and *Amicus Curiae* Brief.

fruits of their illegal behavior, thereby modifying corporate behavior and improving victims' access to justice.

NASCAT's members represent plaintiffs in civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and its state law counterparts. On four previous occasions, NASCAT filed *amicus curiae* briefs in this Court in civil RICO cases. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (statute of limitations); *Grimmett v. Brown*, 519 U.S. 233 (1997) (same); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (§ 1962(c) liability); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (proximate causation).[2]

The authors of this *amicus curiae* brief collectively have five decades of experience representing plaintiffs ***and*** defendants in RICO cases, and they are the authors of law review articles and a two-volume treatise addressing various issues arising in civil and criminal RICO litigation. *See* G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on*

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[2] NASCAT has also filed *amicus curiae* briefs in this Court in cases involving government agent liability, *see Hanlon v. Berger*, 526 U.S. 808 (1999); class action settlements, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); state law claims for punitive damages, *see BMW of No. America v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources*, 509 U.S. 443 (1993); ERISA claims, *see Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); and securities fraud liability, *see Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994); *Musick, Peeler & Garrett v. Wausau, Inc.*, 508 U.S. 286 (1993).

*Substantive, Accessory, Aiding and Abetting, and Conspiracy Liability Under RICO*, 33 Amer. Crim. L. Rev. 1345 (1996) ("Blakey & Roddy, *Reflections*"); Kevin P. Roddy, *RICO in Business and Commercial Litigation* (Shepard's-McGraw Hill 1991); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God – Is This the End of RICO?"*, 43 Vand. L. Rev. 851 (1990) ("Blakey & Perry, *Analysis of the Myths*"); G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526 (1987) ("Blakey & Cessar, *Equitable Relief*"); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) ("Blakey, *RICO Civil Fraud Action*"); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980) ("Blakey & Gettings, *RICO*"). These writings address a variety of issues arising in civil and criminal RICO cases, including the distinction between the RICO "person" and "enterprise" that forms the ultimate basis for the Second Circuit's misguided decision in *Cedric Kushner Promotions, Ltd. v. King*, 219 F.3d 115 (2nd Cir.), *cert. granted*, 69 U.S.L.W. 3397 (2000).

NASCAT respectfully submits that its Motion for Leave to File *Amicus Curiae* Brief should be granted.

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## BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONER*

NASCAT argues herein that the Second Circuit's decision in this case should be reversed. In accordance with Rule 37.1, this *amicus curiae* brief will bring to this Court's attention relevant arguments concerning RICO's language, legislative history, and purposes. Indeed, NASCAT advances ***different*** grounds for reversal than those asserted by Petitioner: NASCAT argues that the "person/enterprise distinction" itself, apart from its application in this appeal, is neither compelled nor supported by RICO's language, legislative history, or express remedial purposes. Based upon our collective experience, the authors of this brief submit that continued adherence to this rule threatens to rob RICO of much of its utility as an essential weapon to combat organized crime and "white-collar" crime. If that rule is rejected, as NASCAT argues herein, the decision of the court below, *a fortiorari*, cannot stand and it must be reversed.

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* Counsel for a party did not author this brief in whole or in part. No person or entity, other than NASCAT, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

## ARGUMENT

### THE PERSON/ENTERPRISE DISTINCTION IS NOT SUPPORTED BY RICO'S STATUTORY LANGUAGE, LEGISLATIVE HISTORY, OR REMEDIAL PURPOSES.

#### A. RICO Was Intended To Provide Weapons To Combat Enterprise Criminality

Enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (1970), RICO provides criminal and civil sanctions that were designed to attack the foundations of organized crime. *See Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 1611 (2000); *United States v. Turkette*, 452 U.S. 576, 589 (1981); *see also Russello v. United States*, 464 U.S. 16, 26 (1983) ("The legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.").[3] RICO's terms, however, ***expressly*** reach

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[3] RICO's Statement of Findings and Purpose declared that the statute sought "the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, ***and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.***" 84 Stat. at 923 (emphasis added). Congress found that "organized crime in the United States [had become] a highly sophisticated, diversified, and widespread activity that annually drained billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." *Id.* at 922. The result was to "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *Id.* at 923. *See Beck*, 120 S. Ct. at 1611.

beyond traditional organized crime to include aggravated "white-collar" crime. Its focus is on "enterprise criminality", that is, "patterns" of violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and systemic fraud committed by, through, or against various illicit or licit "enterprises." *See United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("As finally enacted, RICO authorized the imposition of enhanced penalties and new civil sanctions . . . for all types of organized criminal behavior, that is, ***enterprise criminality***, from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (emphasis added) (quoting Blakey & Gettings, *RICO*, 53 Temp. L.Q. at 1013-14). This Court agrees with these precepts: "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute. . . . " *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989); *see also Sedima, S.P.R.L. v. Imrex Co.*, 472 U.S. 479, 495 (1985) (RICO reaches " 'any person' – not just mobsters"). Congress consciously "drafted RICO broad enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J., Inc.*, 492 U.S. at 248-49.

RICO accomplishes its goals by providing, in criminal prosecutions brought by the United States, the sanctions of fine, imprisonment, and forfeiture for violations of § 1962, *see* 18 U.S.C. § 1963, and, in civil actions brought by the United States ***and*** private parties, the sanctions of injunctions, treble damages, and attorney's

fees for any person "injured in his business or property by reason of a violation of [§] 1962." 18 U.S.C. § 1964(c). *See Humana, Inc. v. Forsyth*, 525 U.S. 299, 313 (1999).[4]

Like the antitrust statutes on which it is modeled, *see Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992), RICO's "private enforcement mechanism . . . [1] deter[s] violators[,] [2] deprive[s] them of the fruits of their illegal actions, and [3] . . . provide[s] ample compensation to victims of [RICO] violations." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (citation omitted).[5] RICO and the federal antitrust statutes exist in

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[4] *See also* Richard L. Bourgeois, Jr., *et al.*, *Racketeer Influenced and Corrupt Organizations*, 37 Amer. Crim. L. Rev. 879, 882-83 (2000) ("Bourgeois, *Racketeer Influenced*") (providing overview of statutory provisions and emphasizing "close relationship between criminal and civil RICO actions"); G. Robert Blakey & John Robert Blakey, *Civil and Criminal RICO: An Overview of the Statute and Its Operations*, 64 Def. Couns. J. 36 (1997) (same).

[5] RICO and antitrust are well integrated because free choice in the marketplace may be restricted by agreement, force, or fraud. *See American C & L Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting). Antitrust focuses on the first, RICO the second and third; together, they promise a market characterized by freedom and integrity, both physical and fiscal. The classic study of the effectiveness of the private enforcement mechanism shows that "[n]either imprisonment nor monetary penalties pose . . . a credible threat. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages. . . . " Michael Block, *et al.*, *The Deterrent Effect of Antitrust Enforcement*, 89 J. of Pol. Economy, 429, 440 (1981). Chief Judge Posner of the Seventh Circuit also forcefully on similar economic grounds for private enforcement of more than actual damages awards against all forms of antisocial conduct, particularly where concealment is present, as in fraud. Richard A. Posner, *Economic Analysis of Law*, 143, 235, 272, 462 (2nd ed. 1977).

tandem.[6] Like the Clayton Act, RICO evidences an unequivocal "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices." *Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 1083 (2000). The object of civil RICO is, therefore, not merely to compensate victims "but to make them prosecutors, private attorneys general, dedicated to eliminating racketeering activity." *Id.* (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997)); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483

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[6] Parallels between antitrust and RICO previously recognized by this Court are reflected in the data on the relationship between criminal and civil litigation. Between 1960 and 1980, of the 22,585 civil and criminal cases brought by the government or private parties under the antitrust laws, 84% were instituted by private plaintiffs. U.S. Dep't of Justice, *Source Book of Criminal Justice Statistics*, 431 (1982). Available data indicates that the ratio of criminal RICO prosecutions to civil RICO actions is about the same (15:100). *See* Blakey & Perry, *Analysis of Myths*, 43 Vand. L. Rev. at 851. Like antitrust, RICO is one of the necessary tools that businesses use to vindicate fraud committed ***against*** them. *See* Edmund L. Andrews, *None Prove So Stubborn as a Giant Spurned*, N.Y. Times, Jan. 11, 1997, at 37 (reporting settlement of RICO action brought by General Motors against Volkswagen); Saul Hansell, *Bankers Trust Settles Suit With P&G*, N.Y. Times, May 10, 1996, at 1 (Bankers Trust Co. of New York settled RICO action brought by Procter & Gamble). Since 1989, however, when this Court's decision in *H.J., Inc.* properly precluded asserting civil RICO claims in routine commercial disputes, the number of civil RICO case filings has steadily declined. For 1994-1997, the number of civil cases filed in federal courts ***increased*** from 235,996 to 265,151 per year. *Statistical Abstract of the United States*, 228 (Table No. 373) (1999). In contrast, the number of civil RICO case filings ***decreased*** from 900 in 1995 to 763 in 1999. *Judicial Business of the United States*, Table C-2A (1999).

U.S. 143, 151 (1987). Accordingly, RICO is to be read broadly and liberally construed to effectuate these remedial purposes, which are "nowhere more evident than in the provision of a private 'claim for relief.' " *Sedima*, 473 U.S. at 497-98 (citing 84 Stat. 947 and stating that RICO must be "liberally construed to effectuate its remedial purposes").[7]

### B. Section 1962 And "Enterprise"

RICO introduced two new concepts: "Enterprise" and "pattern of racketeering activity." *See Agency Holding Corp.*, 483 U.S. at 150 (" 'enterprise' and 'pattern' were simply unknown to common law"). Here, the core concept is "enterprise." *See United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir.), *cert. denied*, 479 U.S. 1986 (1986) ("The central role of the concept of enterprise under RICO cannot be overstated"); Thomas S. O'Neill, Note, *Functions of the Enterprise Concept*, 64 Notre Dame L. Rev. 646, 649-50 (1989) ("O'Neill, *Enterprise Concept*") ("[T]he enterprise concept is at the heart of the statute. It allows RICO to be used against the various types of concerted activity that Congress intended to reach."). Section 1962

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[7] *See generally* David Kurzwell, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum. J.L. & Soc. Probs. 41, 42-43 & n.8 (1996) (stating that RICO's liberal construction clause has been properly applied in criminal cases, but that "judicial hostility to the onslaught of private actions brought under RICO has led [the lower federal courts] to construe RICO's civil provisions strictly – contravening the liberal construction clause" and largely ignoring this Court's construction of the statute) (footnote omitted).

of RICO outlaws each manner in which an "enterprise" engages in, is used to promote, or may be victimized by, long-term criminal activity. Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 Harv. J. Legis. 1, 5 (1993) ("Goldsmith, *Judicial Immunity*"). Thus, § 1962(a) outlaws the investment or use of racketeering proceeds in an "enterprise," and § 1962(b) expands this concept by prohibiting the acquisition or maintenance of an interest in an "enterprise" through any "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(b). *See Beck*, 120 S. Ct. at 1611-12.[8] Section 1962(c) – the statutory provision most relevant here – provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

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[8] Section 1962(a) states that it "shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity" to "use or invest, directly or indirectly, any part of such income, or the proceeds of such income" in the "acquisition of any interest in, or the establishment or operation of any enterprise" which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(a).

Section 1962(b) states that it "shall be unlawful for any person through a pattern of racketeering activity" to "acquire or maintain, directly or indirectly, any interest in or control of any enterprise" which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(b). *See generally* Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum. L. Rev. 661, 666-82, 689-702 (1987) (reviewing origins of § 1962(a) and (b)).

enterprise's affairs through a pattern of racketeering activity.

18 U.S.C. § 1962(c).[9]

Congress defined RICO's key concepts ***broadly***. *See Russello*, 464 U.S. at 21-22 (RICO incorporates "terms and concepts of breadth"). The term "person" – which defines the class that can violate RICO and may sue, if victimized by a RICO violation – includes both natural persons and entities, including "white-collar" institutions. *See* 18 U.S.C. § 1961(3) (" 'person' includes any individual or entity capable of holding a legal or beneficial interest in

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[9] Subsection (d) of § 1962 provides that "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§ 1962]." 18 U.S.C. § 1962(d). *See Beck*, 120 S. Ct. at 1612; *Salinas v. United States*, 522 U.S. 52, 63-65 (1997). One significant difference between RICO and antitrust concerns ***intracorporate*** conspiracies. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), this Court held that a corporation and its wholly-owned subsidiary were incapable of conspiring with each other to violate the Sherman Act. The Seventh and Ninth Circuits, however, hold that § 1962(d) of RICO applies to intracorporate conspiracies. *See Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1129 (9th Cir. 1997); *Webster v. Omnitron Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989). The Eighth Circuit reached the opposite conclusion in *Fogie v. THORN Americas, Inc.*, 190 F.3d 889, 899 (8th Cir. 1999). This subject is comprehensively addressed in Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 Hastings L.J. 1155 (1982); *see also* Blakey & Roddy, *Reflections*, 33 Amer. Crim. L. Rev. at 1439-42.

property").[10] The statutory definition of "enterprise," by illustration, not limitation, includes both ***illicit*** groups and ***legal*** entities. *See* 18 U.S.C. § 1961(4) (" 'enterprise' ***includes*** any individual, partnership, corporation, association, or other legal entity, ***and*** any union or group of individuals associated in fact, although not a legal entity") (emphasis added). *See National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994) ("*NOW*") ("RICO broadly defines 'enterprise' "); *see also Turkette*, 452 U.S. at 580 ("There is no restriction upon the associations embraced by the definition [of 'enterprise']").[11]

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[10] *See, e.g., Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995) (partner in joint farming venture is "person" for RICO purposes because he was capable of holding property). The terms "person" and "whoever" are elsewhere defined to include corporations and other legal entities. *See* 18 U.S.C. § 1; Blakey, *RICO Civil Fraud Action*, 58 Notre Dame L. Rev. at 290 n.151 (tracing deep roots of criminal and civil liability for corporations and other entities in federal jurisprudence). Thus, a broad variety of legal entities have been found to be RICO "persons." *See Jund v. Town of Hempstead*, 941 F.2d 1271, 1281-82 (2nd Cir. 1991) (unincorporated political associations); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1305 (2nd Cir. 1990) (finding RICO's application to public utilities as "persons" proper); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989) (corporations are "persons" for RICO purposes).

[11] The Department of Justice states that "the courts have given a broad reading to the term 'enterprise.' " By following Congress' mandate that RICO be construed liberally, "the courts have held that the list of enumerated entities [in § 1961(4)] is not exhaustive but merely illustrative." 10A U.S. Dep't of Justice Manual, *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors*, § 9.110A-100 at 29 (1991-1 Supp.). Courts have found that public entities and governmental agencies, as well as private entities, may constitute RICO

Finally, the term "racketeering activity" includes a variety of offenses traditionally associated with "white-collar" crime, including fraud, bribery, extortion, interstate transportation offenses, and bankruptcy fraud. *See* 18 U.S.C. § 1961(1)(A)-(E) (definition of "racketeering activity"); *Beck*, 120 S. Ct. at 1611 n.2 ("Section 1961(1) contains an exhaustive list of acts of 'racketeering,' commonly referred to as 'predicate acts.' "); 84 Stat. at 922-23 (RICO encompasses "fraud and corruption . . . harm[ing] innocent investors, competing organizations [and] interfer[ing] with free competition and seriously burden[ing] interstate and foreign commerce . . . requiring enhanced sanctions and new remedies").

### C. The Roles Played By RICO Enterprises

As this Court recognizes, each subsection of § 1962 proscribes varying manifestations of "enterprise criminality" and, depending upon the facts, the "enterprise" may play different roles: It may, in turn, be a beneficiary or prize, an instrument, a victim, or a perpetrator. *See NOW*, 510 U.S. at 258-59 & n.5.[12] In *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), Judge Cudahy of the Seventh

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enterprises. *See* Bourgeois, *Racketeer Influenced*, 37 Amer. Crim. L. Rev. at 893-95 & nn. 103-124 (providing examples of RICO enterprises).

[12] *See also* Goldsmith, *Judicial Immunity*, 30 Harv. J. Legis. at 22-23 ("Depending on the circumstances, the enterprise may serve a variety of functions: (a) beneficiary or prize, (b) instrumentality, (c) victim, or (d) perpetrator of crime.") (footnote omitted) (citing Blakey, *RICO Civil Fraud Action*, 58 Notre Dame L. Rev. at 307-25).

Circuit, referring to one of the co-authors of this brief, stated:

> We find helpful here Professor Blakey's discussion in *The RICO Civil Fraud Action in Context, supra*, 58 NOTRE DAME LAW. at 307-25. Blakey points out that under the subsections of [§] 1962, the enterprise may play the various roles of victim, prize, instrument or perpetrator. ***The RICO liability of the enterprise should depend on the role played.***

747 F.2d at 401 (emphasis added).

Thus, under § 1962(a), the "enterprise" may be characterized as a ***beneficiary*** of criminality because it received illicit profits. *See* Goldsmith, *Judicial Immunity*, 30 Harv. J. Legis. at 23.[13] Appropriately, the circuit courts hold that a § 1962(a) "enterprise" and a "person-defendant" may be identical when the enterprise is a ***perpetrator*** or ***direct or indirect beneficiary*** of the pattern of racketeering activity.[14] "When interpreted in this way, [§]

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[13] For example, in *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980), the RICO defendant was a small town mayor who used his position to channel illegally obtained funds into two businesses he owned. He was convicted of a § 1962(a) violation in a prosecution where the businesses were the RICO enterprises. Because the mayor invested money obtained through bribery and extortion into his businesses, the firms were beneficiaries of his unlawful conduct. "The businesses were neither victimized nor used as instruments, nor were they involved in the predicate acts as perpetrators." O'Neill, *Enterprise Concept*, 64 Notre Dame L. Rev. at 675-76. *See also* Blakey, *RICO Civil Fraud Action*, 58 Notre Dame L. Rev. at 308-09 n.175.

[14] *See Crowe*, 43 F.3d at 205; *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 345 (2nd Cir. 1994); *New*

1962(a) provides one mechanism to punish such corrupt organizations by depriving them of their ill-gotten gains" and compensating their victims. *Yellow Bus*, 883 F.2d at 140. Such "corrupt organizations" are subject to "direct liability under" § 1962(a). *Riverwoods*, 30 F.3d at 345. As the Seventh Circuit explained:

> [A] corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator . . . Under subsection (a), . . . the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is the direct or indirect beneficiary of the pattern of racketeering . . . This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering. . . .

*Haroco*, 747 F.2d at 402 (footnotes omitted).

Petitioner did not assert a claim against Respondents under § 1962(a), presumably because the Second Circuit follows the restrictive "use or investment injury" rule. *See*

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*Beckley Mining Corp. v. International Union, UMWA*, 18 F.3d 1161, 1163 (4th Cir. 1994); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 140 (D.C. Cir. 1989), *modified on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*), *cert. denied*, 501 U.S. 1222 (1991); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986). *See also* Bourgeois, *Racketeer Influenced*, 37 Amer. Crim. L. Rev. at 900 n.157 (collecting cases); Blakey & Roddy, *Reflections*, 33 Amer. Crim. L. Rev. at 1648 nn. 25 & 26 (collecting decisions reaching this conclusion under § 1962(a) and (b)).

*Discon, Inc. v. Nynex Corp.*, 93 F.3d 1055, 1063 (2nd Cir. 1996), *cert. denied*, 522 U.S. 809 (1997).[15] As this case illustrates, application of § 1962(c)'s "person/enterprise distinction" and § 1962(a)'s "use or investment injury" rule effectively insulates white-collar institutions from civil RICO liability.

### D. Section 1962(c) Liability For Perpetrator Enterprises

Under § 1962(c), the enterprise is generally a ***perpetrator*** or ***instrumentality*** of racketeering activity; in an

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[15] The circuit courts are split on the specific standing requirements in a civil RICO action alleging violations of § 1962(a). While plaintiff must allege that someone received income from a pattern of racketeering activity and used or invested this income in an enterprise, the circuit courts disagree on whether the compensable injury must only flow from the use or investment of the income, or whether injury suffered as a result of the commission of the predicate acts is in addition compensable. *Compare Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149-51 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989) (adopting a rule that denies recovery for injury by racketeering activity and limits recovery to injury by investment or use under § 1962(a), even though it frustrates RICO remedial goals) *with Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 (4th Cir. 1990) (holding that broadly drafted "by reason of" language of § 1964(c) allows recovery for injuries despite fact that "one element of the violation, the use of the proceeds, may not have contributed to or caused the injury"). While a decisive majority of the circuits follow the more restrictive rule, *see Fogie*, 190 F.3d at 895 (collecting cases), it is subject to severe criticism on statutory and policy grounds. *See* Blakey & Perry, *Analysis of the Myths*, 43 Vand. L. Rev. at 863 n.29. This court noted, but did not address, § 1962(a)'s "use or investment injury" rule in *Beck*, 120 S. Ct. at 1616 n.9.

appropriate case, it may be a ***victim***. *See* Goldsmith, *Judicial Immunity*, 30 Harv. J. Legis. at 23; *see also NOW*, 510 U.S. at 259 ("[T]he 'enterprise' in subsection connotes generally the ***vehicle*** through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity") (emphasis added). The enterprise acts as a ***perpetrator*** when it engages in racketeering activity. *See H.J., Inc.*, 492 U.S. at 234 (a RICO enterprise, Northwestern Bell, bribed members of public utilities commission); *Turkette*, 452 U.S. at 579 (RICO enterprise was illicit association formed to commit, *inter alia*, arson to defraud insurance companies); *United States v. Salerno*, 868 F.2d 524, 528-29 (2nd Cir. 1989) (mob "commission" enterprise engaged in wide variety of illegal conduct).

The enterprise acts as an ***instrumentality*** when used by criminals to promote racketeering activity. *See United States v. Blackwood*, 768 F.2d 131, 134 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985) (RICO enterprise, a circuit court, served as instrument to promote bribery). The "enterprise" may be a ***victim*** when it does not act, but is acted upon. *See United States v. Rubin*, 591 F.2d 278, 280-84 (5th Cir. 1977), *cert. denied*, 444 U.S. 864 (1979) (RICO enterprise-labor union was victim of pattern of embezzlement); *see also Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 & n.6 (9th Cir. 1987) (savings and loan victimized by president's loan kickback scheme); *accord United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 362 (9th Cir. 1988) (enterprise was plaintiff-entity "manipulated by" defendants).[16] These categories are not mutually

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[16] Given the facts of this case, it appears that Petitioner could have alleged in the alternative that corporate

exclusive; they are merely helpful semantic devices. *See* Blakey, *RICO Civil Fraud Action*, 58 Notre Dame L. Rev. at 307 n.173.

Section 1962(c) may be properly used to strike at any "enterprise" that perpetrates or profits from racketeering. Because the statute defines "person" to include any ***individual*** or ***entity*** capable of holding a legal or beneficial interest in property, § 1962(c) "reaches both mobsters conducting the affairs of an organized-crime family" and corporations that are "engaged in white-collar crime." Goldsmith, *Judicial Immunity*, 30 Harv. J. Legis. at 23-24. As a result, in the words of the Seventh Circuit, "the corporate entity ***should*** be liable where it is the perpetrator, or the central figure in the criminal scheme." In that situation, "the corporate deep pocket should certainly be subject to RICO liability." *Haroco*, 747 F.2d at 401 (emphasis added). Nonetheless, judicial holdings improperly protect ***perpetrator*** enterprises from liability by applying the "person/enterprise distinction" under § 1962(c).

### E. The Fallacies Underlying The "Person/Enterprise Distinction"

This misguided rule had its genesis in *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), where the government filed a

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Respondents Don King Productions, Inc. and DKP Corporation were ***perpetrators*** of racketeering activity as well as ***instrumentalities*** through which individual Respondent Don King committed predicate acts. *See Cedric Kushner Promotions*, 219 F.3d at 116-17.

multi-count criminal RICO indictment against Computer Sciences Corp. and its officers. Two counts of the 57-count indictment designated a corporate division as the RICO enterprise. A third count named Computer Sciences Corp. as the enterprise. *Id.* at 1184. The Fourth Circuit rejected these three counts insofar as they named Computer Sciences Corp. as the enterprise: "We conclude that 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit." *Id.* at 1190. The court reached this conclusion without careful statutory analysis, and it did not employ RICO's liberal construction clause; in fact, the court resorted to the opposite interpretive standard: The rule of "lenity." *Id.* at 1190-91. *Computer Sciences* established the new rule that the person named as a RICO defendant must be ***distinct*** from the RICO enterprise.[17] Soon, all but one of the circuit courts adopted the "person/enterprise distinction" rule. *See, e.g., Schofield v. First Commodity Corp.*, 793 F.2d 28, 29-34 (1st Cir. 1986).[18]

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[17] *See* Frederick Woodbridge, Jr., Note, *Recent Developments in RICO: The Corporation as "Enterprise" and Defendant*, 52 U. Cin. L. Rev. 503, 506-10 (1983) ("Woodbridge, *Corporation as "Enterprise"*) (discussing *Computer Sciences*). The Fourth Circuit, addressing this issue *en banc*, subsequently upheld *Computer Sciences'* holding with regard to § 1962(c) but overruled *Computer Sciences'* similar holding that § 1962(a) requires that the RICO defendant be separate and distinct. *See Busby*, 896 F.3d at 838, and note 14, *supra*. Independent of *Computer Sciences*, the "person/enterprise distinction" was also adopted in civil RICO litigation. *See Von Schaick v. Church of Scientology of Calif., Inc.*, 535 F. Supp. 1125, 1135-36 (D. Mass. 1982).

[18] *See also Yellow Bus*, 883 F.2d at 140; *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2nd Cir. 1985), *cert. denied*, 474 U.S.

The circuit courts offer several justifications for the rule. ***First,*** they claim that the text of § 1962(c) "clearly envisions two entities." *Bennett*, 770 F.2d at 315; *see also*

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1058 (1986); *Bishop v. Corbett Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1987); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989); *Haroco*, 747 F.2d at 400; *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987). For recent circuit decisions adhering to the person/enterprise distinction rule, *see Bessette v. Avco Finan. Svcs., Inc.*, 230 F.3d 439, 448 (1st Cir. 2000); *Begala v. PNC Bank*, 214 F.3d 776, 781 (6th Cir. 2000). *See also* David B. Smith & Terrance G. Reed, *Civil RICO*, ¶ 3.07 at 3-77 to -78 & nn. 2 & 3 (1998) (collecting cases); Blakey & Cessar, *Equitable Relief*, 62 Notre Dame L. Rev. at 581 n.235 (tracing genesis of rule and rejecting it on statutory analysis and public policy grounds).

Only *United States v. Hartley*, 678 F.2d 961, 988 (5th Cir. 1982), held that the same person or entity could be named as both the RICO person and enterprise under § 1962(c). *Hartley* found no statutory language that prevented a corporation from being both the liable "person" and the "enterprise." *Id.* The Fifth Circuit found no practical difference between a complaint or indictment naming a corporation as the "enterprise" and one naming an association-in-fact as the "enterprise" with a corporation as a member of the association. 678 F.2d at 989-90. The court concluded that where the defendant corporation was the central figure in a criminal scheme, Congress did not intend to let that perpetrator escape RICO liability, while subjecting only its sidekicks to the statute's severe penalties. *Id.* at 989. *See* Woodbridge, *Corporation as "Enterprise,"* 52 U. Cin. L. Rev. at 510-15 (discussing *Hartley*). Although *Hartley* had support, *see* Blakey & Perry, *Analysis of the Myths*, 43 Vand. L. Rev. at 968; Blakey & Cessar, *Equitable Relief*, 62 Notre Dame L. Rev. at 581 n.235; and Blakey, *RICO Civil Fraud Action*, 58 Notre Dame L. Rev. at 324 n.181, it was overruled by the Eleventh Circuit with only a superficial reexamination of the issues. *See United States v. Goldin Indus., Inc.*, 219 F.2d 1268, 1270-71 (11th Cir.) (*en banc*), *on remand*, 218 F.3d 1271 (11th Cir.), *cert. denied*, 121 S. Ct. 573 (2000). *See also* note 19, *infra*.

*Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 n.3 (7th Cir. 2000). ***Second,*** they assert that "[the] distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity." *Bennett*, 770 F.2d at 315; *see also Haroco*, 747 F.2d at 401. ***Finally,*** because RICO's legislative history indicates that its "primary purpose [was] . . . 'to cope with the infiltration of legitimate businesses,' " the courts say that "it is logical that Congress would have designed [§] 1962(c) so that it reached the criminal but protected the victimized enterprise from liability." *Schofield*, 793 F.2d at 31.

These justifications are illusory, and their fallacies are easily exposed. ***First,*** § 1962(c) does ***not*** envision two entities; rather, its text envisions a "person" and an "enterprise." Because "person" and "enterprise" both include "***any*** . . . entity," 18 U.S.C. § 1961(3)-(4) (emphasis added), the statute ***expressly*** contemplates not separation but potential overlap between the "person/entity" and the RICO enterprise. "Any" means "all," not some, but not others. *Mobil Oil Exploration v. United Distribution Co.*, 498 U.S. 211, 223 (1991); *cf. Turkette*, 452 U.S. at 580-81. Indeed, a contrary rule would prohibit the prosecution of members of an organized crime family where the "enterprise" was the "family" itself. That result, obviously, cannot be squared with RICO's express purposes. *See Atlas Pile Driving Co. v. DiCon Finan. Co.*, 886 F.2d 986, 995 (8th Cir. 1989).[19] A student note puts it aptly:

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[19] Numerous courts – including the Second Circuit – properly recognize that a defendant can be a "person" and be ***part*** of the enterprise, reasoning that the prohibition against the

> The notion that the statutory language precludes enterprise liability under [§] 1962(c) is

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unity of person and enterprise applies "only when the singular person or entity is defined as both the person and the ***only*** entity comprising the enterprise." *Goldin Indus.*, 219 F.3d at 1275 (emphasis added; citations omitted). In that case, following remand from the Eleventh Circuit *en banc* (*see* note 18, *supra*), the Eleventh Circuit panel affirmed the criminal convictions of three corporations, holding that they could be indicted as RICO persons while also being a part of an association-in-fact enterprise comprised of the three corporations and four individual defendants. *Id.* at 1275-77. As Judge Barkett explained:

> To find that a defendant cannot be ***part*** of the enterprise would undermine the purposes of the RICO statute. Indeed, RICO requires that the person be "employed by or associated with" the enterprise. 18 U.S.C. § 1962(c). Thus, a § 1962(c) defendant may be simultaneously a RICO person and a ***member*** of the enterprise. *Cullen v. Margiotta*, 811 F.2d 698, 730 (2d Cir. 1987). Although RICO forbids the imposition of liability where the enterprise is nothing more than a subdivision or a part of the person, the requirement does not run the other way. *Davis v. Mutual Life Ins. of New York*, 6 F.3d 367, 378 (6th Cir. 1993). Thus, the fact that each corporation was a defendant "person" and also ***part*** of the union of corporations which was the enterprise does not as a matter of law preclude a conviction.

*Goldin Indus.*, 219 F.2d at 1276 (emphasis in original). *Accord St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 447 (5th Cir. 2000) ("Although a defendant may not be both a person and an enterprise, a defendant may be both a person and a part of an enterprise. In such a case, the individual defendant is distinct from the organizational entity.") (citation omitted). *See also* Christopher W. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of Reves v. Ernst & Young*, 71 Tul. L. Rev. 1133, 1143 & n.30 (1997) (collecting cases).

> questionable on its face. Although "self-association" is not vernacular, "self-employed" is hardly archaic. Notably, courts have permitted sole proprietorships to fill both the "enterprise" and "person" roles.

Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 Notre Dame L. Rev. 179, 200 (1988) (footnotes omitted) (citing *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985) (sole proprietorship can be both "person" and "enterprise" under § 1962(c), so long as not "strictly a one man band"), and *United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986) (stating that the corporate form is the "sort of shield for illegal activity that Congress intended RICO to pierce").[20]

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In *Goldin Indus.*, the Eleventh Circuit found persuasive *Securitron Magnalock Corp. v. Schabolk*, 65 F.3d 256, 263 (2nd Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996), which held that despite common ownership and a common officer and agent, each of the defendant corporations could be held individually liable under § 1962(c) while also being considered jointly as constituting the RICO enterprise. *See Goldin Indus.*, 219 F.2d at 1277. In this case, however, the Second Circuit ignored its previous decision in *Securitron Magnalock*. *See Cedric Kushner Promotions*, 219 F.2d at 116-17.

[20] *Accord United States v. London*, 66 F.2d 1227, 1244 (1st Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996) (defendant was distinct from corporation and sole proprietorship that formed association-in-fact enterprise; corporation had several employees other than defendant and sole proprietorship had at least one employee other than defendant); *United States v. Robinson*, 8 F.3d 398, 406-07 (7th Cir. 1993) (corporation was enterprise distinct from defendant controlling shareholder because corporation employed several hundred people and filed separate tax returns).

Other circuits justify the person/enterprise distinction under § 1962(c), while not requiring it under § 1962(a), in the mistaken belief that the statutory language is different. *See Haroco*, 747 F.2d at 402; *see also* James D. Higgason, Jr., Note, *Enterprise Liability in Private Civil RICO Actions*, 45 Wash. & Lee L. Rev. 1447, 1458-64 (1988). Any textual difference between § 1962(a) and (c) is illusory insofar as the person/enterprise distinction is concerned and, because the statute contemplates that both a "person" and an "enterprise" may be ***any entity***, overlap between the person and the enterprise is not precluded. Professor Goldsmith writes: "Liability should turn on whether the organization acts as a criminal perpetrator rather than on metaphysical questions of whether the person and enterprise are sufficiently distinct." Goldsmith, *Judicial Immunity*, 30 Harv. J. Legis. at 30 (footnote omitted) (citing *Haroco*, 747 F.2d at 401 (recognizing person/enterprise distinction, but stating that "[d]iscussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse – after all, when is the person truly an entity 'distinct' or 'separate' from the enterprise?")).

***Second***, while the "enterprise" may be "a passive instrument or victim of the racketeering activity," depending on the facts of the particular case, *Bennett*, 770 F.2d at 315, § 1962(c) also reaches ***perpetrator*** enterprises; indeed, in *Turkette*, 452 U.S. at 591-93, this Court found

this reach essential to achievement of RICO's major purpose.[21] Neither passive instruments nor victims, even though RICO "enterprises," face liability under § 1962(c) because of well-established rules of criminal (and civil) responsibility that exist independent of the person/enterprise distinction: The "intent to benefit" rule and the "victim exclusion rule." *See New York Central & Hudson R.R. Co. v. United States*, 212 U.S. 481, 492-93 (1909) (corporation may be held criminally liable only if agent acted with intent to benefit it); *see also United States v. Gebardi*, 287 U.S. 112, 119-23 (1932) (passive victim of offense excluded from liability). Thus, as Professor Goldsmith states, "the person/enterprise distinction is both redundant and unduly broad, since it simultaneously protects both innocent entities, which are already protected, and perpetrator entities, which merit no protection." Goldsmith, *Judicial Immunity*, 30 Harv. J. Legis. at 26.

***Finally,*** although RICO's enactment three decades ago primarily reflected concern with the infiltration of legitimate business by organized crime, Congress sought a broad-based statute that would be capable of addressing complex criminal problems and offering significant redress to a variety of victims of wrongdoing; it was not ***only*** focused on infiltration. *See Turkette*, 452 U.S. at 591. Thus, white-collar enterprises that are ***perpetrators*** of

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[21] RICO's legislative history supports this Court's conclusion in *Turkette* that § 1962(c) reaches ***perpetrator*** enterprises. *See* Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 Colum. L. Rev. 774, 776-84 (1988) (reviewing legislative history and development of § 1962(c)); *see also* Blakey & Roddy, *Reflections*, 33 Amer. Crim. L. Rev. at 1666-71.

racketeering activity clearly fit within RICO's intended scope. Mistakenly, the person/enterprise distinction effectively reads the "organized crime" limitation into the teeth of the statutory text, legislative history, express remedial purposes, and the repeated pronouncements of this Court. As a practical matter, if "white-collar crime" is excluded, that leaves only "organized crime" within RICO's scope, meaning that the lower courts have improperly accomplished by indirect means that which this Court denied them by direct means.

Like the decisions of the other circuit courts, the opinion of the Second Circuit in this case ignores RICO's plain text (in particular, its liberal construction clause), its legislative history, and its express remedial purposes to confer judicial immunity upon "white-collar" institutions that are willful perpetrators of egregious wrongdoing. *Cedric Kushner Promotions*, 219 F.3d at 116-17.[22] The court below acknowledged that its holding was "in tension, if

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[22] The court below relied on the Second Circuit's earlier decision in *Discon*, 93 F.3d at 1063-64, which stated that § 1962(c) " 'clearly envisions' that the 'person' and the 'enterprise will be distinct,' " and that this requirement is not satisfied where the alleged RICO enterprise is a parent corporation and its wholly-owned subsidiaries, with the parent corporation cast as the defendant "person." *Id.* (citation omitted). The *Discon* court held that the distinctiveness requirement was not satisfied where the three corporate defendants constituted the alleged RICO enterprise; even though they constituted three separate legal entities, the three affiliates "operated within a unified corporate structure" and were "guided by a single corporate consciousness." *Id.; accord Falise v. American Tobacco Co.*, 2000 U.S. Dist. LEXIS 13440, at *2-3 (E.D.N.Y. Sept. 21, 2000).

not conflict" with decisions from the Third, Sixth, Seventh, Ninth and Tenth Circuits. *Id.* at 117 n.4. Even those courts, while adhering to the "person/enterprise distinction" recognize that the officers or employees of an entity may conduct the affairs of an enterprise consisting of the employing entity. *See, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Co.*, 46 F.3d 258, 268-69 (3rd Cir. 1995) (distinctiveness requirement is satisfied with allegations of "conduct by officers or employees who operate or manage a corporate enterprise"); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (same).[23] Although the Second Circuit's decision in this case may be reversed by this Court on this ground alone, NASCAT submits that this narrow exception to the "person/enterprise distinction" rule does not permit plaintiffs who are the victims of a pattern of racketeering activity to obtain fair and just compensation from the wrongdoers.

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[23] But this exception to the "person/enterprise distinction" rule goes no further. For example, the lower courts do not permit civil RICO plaintiffs to name a corporate entity as a defendant and allege that the corporation and its employees constitute the enterprise. *See, e.g., Fogie*, 190 F.3d at 897-98 (a firm and its employees, or a parent company and its subsidiaries, are not an enterprise separate from the firm itself); *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (affirming dismissal of RICO claims because "a firm and its employees, or a parent and its subsidiaries" do not constitute an enterprise separate from the firm); *Brannon v. Boatmen's First Nat'l Bank of Oklahoma*, 153 F.3d 1144, 1147-48 (10th Cir. 1998) (allegation that subsidiary was RICO "person" and parent company was "enterprise" did not state RICO claim); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226 (7th Cir. 1997) (employer, employees and independent corporations that were acting as agents of the corporation do not constitute RICO enterprise).

### F. This Court Should Abolish The Person/Enterprise Distinction Applied By The Lower Courts Under Section 1962(c)

Sixteen years ago, the American Bar Association's Section of Corporation, Banking and Business Law issued its influential *Report of the Ad Hoc Civil RICO Task Force* (1985) (*"ABA Report"*).[24] The *ABA Report* recommended that RICO should "be amended to make clear that the use of the words 'person' and 'enterprise' in [§] 1962(c) is not intended to make culpable enterprises immune from Civil RICO claims." *Id.* at 377. The ABA Task Force offered the following rationale for its position:

> In the case of such a legal entity as "enterprise," *e.g.*, a partnership or corporation, it is clear that RICO is directly addressed to acts of racketeering by members, employees, or agents in the course of conducting the affairs of the enterprise. But if these criminal acts are committed by individuals and in a manner that also constitutes criminal acts of ***the enterprise,*** there appears to be no policy reason for insulating the assets of the enterprise from criminal penalties or civil damages . . .
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> [F]or example, suppose the Board of Directors of a corporation commits multiple mail frauds in its operation of the company. Surely each participating member of the Board faces possible RICO liability. The only policy reason not to hold the company liable as well is to protect

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[24] This Court cited and relied on the *ABA Report* in *Sedima*, 473 U.S. at 481 n.1, 494 n.12, 499 n.16, 500.

> corporate assets owned by innocent shareholders. But this interest may well be outweighed by (1) the preference of allocating risk or loss to persons who have exercised some choice in corporate governance or who can otherwise potentially exercise some control over corporate affairs; (2) the desire to encourage private enforcement actions when a legitimate enterprise is being turned to corruption; (3) the need to encourage shareholders to insist upon internal audit procedures to protect against such corporate activities; (4) the aim of ensuring full compensation of losses suffered by victims; (5) the availability of actions on behalf of the corporation or shareholders against the Board members; and (6) the appropriateness of holding the corporate entity liable as a separate person just as many of the advantages of "personhood" inure to its benefit. ***Accordingly, under circumstances like these, the policies underlying RICO would appear to argue in favor of liability of an "enterprise" which also is a "person" pursuing its affairs through racketeering activities.***

*ABA Report* at 374-76 (latter emphasis added; footnotes omitted).[25]

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[25] Other commentators have agreed with the ABA Task Force's conclusions. *See* Blakey & Perry, *Analysis of the Myths*, 43 Vand. L. Rev. at 968-69 n.386; Blakey & Cessar, *Equitable Relief*, 62 Notre Dame L. Rev. at 582-83 n.235; *see also* Woodbridge, *Corporation as "Enterprise,"* 52 U. Cin. L. Rev. at 515 (contending that the conflict between the Fourth Circuit's decision in *Computer Sciences* and the Eleventh Circuit's decision in *Hartley* "must be resolved in favor of authorizing the dual role of the corporation as both enterprise and defendant, in light of the policy underlying RICO and the doctrine of corporate personality").

The influential words written by the ABA Task Force sixteen years ago have gone unheeded by the lower courts, even when defrauded plaintiffs can plausibly allege that the corporation-defendant is part of an association-in-fact RICO enterprise. *See, e.g., Stachon*, 229 F.2d at 675-76; *VanDenBroeck v. Commonpoint Mortg. Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000); *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 155 (5th Cir. 1997), *vacated on other grounds*, 525 U.S. 979 (1998); *Fitzgerald*, 116 F.3d at 226. A corporate entity that benefits from a fraudulent scheme in which it plays an active role (as opposed to being victimized or serving as a "front" for wrongdoers) should be identified as a "person" and an "enterprise" in a civil RICO action (or criminal RICO prosecution) alleging violations of § 1962(c) and (d). As set forth herein, nothing in the statutory language precludes that dual role. Because the corporate form is used widely by organized crime and white-collar wrongdoers, permitting the identification of corporations as defendant "persons" under § 1962(c) and (d) exposes them to the enhanced penalties RICO provides for substantive predicate offenses, and is consistent with basic principles of sound public policy, as the ABA Task Force recognized.

Only the force of unanimity among the circuit courts supports the person/enterprise distinction; neither the statutory text, nor RICO's legislative history, nor its express remedial purposes support this misguided reading of the statute. That force, however, ought not be decisive:

> While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court's jurisprudence.

> Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread.

*Brogan v. United States*, 522 U.S. 398, 408 (1998) (finding nothing to support the "exculpatory no" doctrine "except the many Court of Appeals decisions that have embraced it").

## CONCLUSION

For the reasons stated herein, the decision of the Second Circuit Court of Appeals in this case should be reversed. This Court should abolish the "person/enterprise distinction" employed by the circuit courts, which is unsupported by RICO's statutory language or legislative history, and is directly contrary to the statute's salutary purposes.

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